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# In The
# Supreme Court of the United States

October Term, 1959

## No. 478

O. Q. KIZZIAR AND MILDRED KIZZIAR, his wife,
*Petitioners,*

VERSUS

B. L. DOLLAR, doing business as B. L. DOLLAR CONSTRUCTION COMPANY,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NOVEMBER, 1959.

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# INDEX


| | PAGE |
|---|---|
| Statement of Case | 1 |
| Argument | 2 |
| Construction Contract Indivisible | 3 |
| Claimed Credits | 6 |
| Erroneous Admission of Evidence | 7 |
| Reopening of Judgment | 8 |
| Assessment of Costs on Appeal | 9 |
| Authority: | |
| Brown v. Consolidated Fisheries, 8 F. R. D. 433 | 10 |
| Ex parte Peterson, 253 U. S. 300, 64 L. Ed. 919 | 10 |
| Lane v. Miller, 101 Okl. 14, 222 P. 968 | 4 |
| Robinson v. Beaty, 75 Okl. 69, 181 P. 941 | 7 |
| U. S. General Talking Pictures Corp. v. Western Electric Co., 58 S. Ct. 849, 304 U. S. 175, 546, 82 L. Ed. 1273 | 7 |
| 9 Am. Jur. page 30 | 5 |
| Rule 26 of the Tenth Circuit Court of Appeals | 9 |
| Rule 54 (d) of the Federal Rules of Civil Procedure | 10 |
| Conclusion | 10 |

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### STATEMENT OF CASE

This cause involves a simple argument between the petitioners, Kizziar and wife, and the respondent, Dollar, over the agreed contract price for the construction by respondent on the property of petitioners of a medical office building. Dollar instituted a lien foreclosure action in a state court for the construction costs, and it is only

by a rather anomalous factual situation that the case now appears in the Federal courts.

Shortly after institution of the lien foreclosure action in state court, the United States filed against Kizziar a Notice of Tax Lien thereby disclosing the failure of Kizziar, over a course of two or three years, to remit to the government the social security and income taxes as withheld by him from the salaries of his employees. Dollar thereupon joined the United States as a party defendant in his lien foreclosure action, whereupon the cause was removed to the Federal Court by the United States.

The cause was tried in the Federal District Court resulting in judgment in favor of respondent. Petitioners thereupon appealed to the Circuit Court of Appeals. The Circuit Court denied all major contentions of the petitioners and affirmed the judgment of the District Court but remanded the cause for further factual findings and modification of the judgment in two minor particulars. Pending determination of the appeal in the Circuit Court the tax item owing the United States was paid by Kizziar and the United States is no longer interested in this cause. From the judgment of the Circuit Court of Appeals petitioners now seek writ of *certiorari*.

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## ARGUMENT

Respondent readily concedes as stated by petitioners in their Petition, that this cause is properly to be de-

termined in accordance with the laws of the State of Oklahoma. The written and oral contracts here in litigation were Oklahoma contracts and the liabilities arising thereon are to be determined in the light of the statutory law of Oklahoma, and the decisions of its highest court. As stated, but for the once prevailing but now non-existant interest of the United States in the cause, the case would have never reached the Federal courts.

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**Construction Contract Indivisible**

By their Petition, petitioners assert that the construction contract here in question was an entire, indivisible contract which was not substantially performed by reason whereof the District Court erred in granting respondent any judgment thereon, and the Circuit Court erred in affirming same. Petitioners, in effect, thus assert that the building as here constructed by Dollar on their property should be given to them free of cost by denying to Dollar his agreed costs of construction. This petitioners do in the face of the evaluation of this building by Kizziar, after its completion, at the sum of $28,000.00 (R. 51). The law of Oklahoma, or any other state, justifiably gives no heed to such an inequitable position as is thus assumed by petitioners.

Beginning in the District Court and throughout their appeal to the Circuit Court petitioners have urged upon the court the decisions of the Oklahoma court as set forth

in their petition as herein filed. The District Court, after a detailed trial, found that the respondent, Dollar, had substantially complied with his contract of construction, made allowance for the two minor particulars in which a departure from substantial compliance was found to exist, and rendered judgment accordingly. The Circuit Court affirmed the trial court in all material respects and remanded the cause for further factual findings on two minor details, and possible modification of the judgment to conform to the change of findings of fact, if any. Both the decisions of the District Court and the Circuit Court on appeal, as stated therein, were rendered in the light of the statutory rules of law and the interpretation thereof as enunciated by the Supreme Court of Oklahoma.

Petitioners here contend for a literal compliance with the terms of the construction contract here in question. The law of the State of Oklahoma in construing the rights of the parties under a construction contract such as is here in question, is very clear.

In the case of *Robinson* v. *Beaty*, 75 Okl. 69, 181 P. 911, the Oklahoma Court ruled:

> "Since the rule of exact or literal performance has been relaxed, literal compliance with a building contract is not essential to a recovery thereon, but a performance thereof in all its material and substantial particulars is sufficient."

In the case of *Lane* v. *Miller*, 101 Okl. 14, 222 P. 968, the Oklahoma Court ruled:

"A contractor, who has in good faith endeavored to perform all that is required of him by the terms of his contract for the construction of a building, and has in fact substantially performed the same, is ordinarily entitled to sue upon his contract and recover the contract price less proper deductions therefrom on account of omissions, deviations, and defects, chargeable to him, especially where the owner occupies and uses such building. Evidence tending to prove a substantial performance of the contract and a faithful endeavor on the part of the builder to perform all the terms of the contract is admissible."

In 9 Amer. Juris. Page 30, the general rule supported by the opinions of the appellate courts of virtually every State of the Union and of the federal courts, and the equitable reasons supporting the same, are stated as follows:

"The American courts are united in holding that a substantial performance of a building contract will support a recovery either on the contract or on a *quantum meruit* basis.

"Three reasons are given for the rule that a substantial performance of a building contract will support recovery. The first is that the work on a building is such that even if rejected the owner of the land must receive the benefit of the contractor's labor and materials, which is not the case where a chattel is constructed as the chattel may be returned. Since the owner must receive the fruits of the builder's labor, it is deemed equitable to require the former to pay for what he gets * * * The second reason is that it is next to impossible for a builder to comply literally with all the minute specifications in a building contract. The third reason is that the parties are presumed to have impliedly agreed to do what is

reasonable under all the circumstances with reference to the subject of performance."

A review of the findings of fact and the judgment of the trial court and a review of the opinion as rendered herein by the Circuit Court on appeal discloses that this cause has been determined in the light of the statutory law and the decisions of the highest court of the State of Oklahoma, as petitioners, by their Petition, assert should have been done. And, in the light of the law of the State of Oklahoma, the District Court made factual findings completely supporting its judgment of substantial compliance, which judgment, in all material respects, was affirmed by the Circuit Court. Respondent thus respectfully urges that petitioners are without right of complaint on the issue here raised.

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**Claimed Credits**

Petitioners further urge that factually they were entitled to certain credits not granted by the trial court in the form of alleged savings experienced by Dollar in alleged deviations and omissions from the terms of the construction contract. This contention on the part of petitioners was considered in detail by both the trial court and the Circuit Court on appeal. The trial court found that Kizziar agreed to all such changes except in two instances for which the trial court made proper allowance. It is conceded by respondent that departures were made

from the terms of the construction contract—some at a savings to Dollar—some at greater expense to him. For instance Dollar installed light fixtures of a value in excess of $700.00, whereas the specifications provided that Kizziar would furnish all light fixtures in excess of $100.00 (R. 26). Dollar, at a greater expense to himself, installed five outside doors, whereas the specifications called for only three (R. 46). Dollar, at a greater expense to himself, installed accoustical ceiling rather than celotex as called for by the specifications (R. 26). In common fairness petitioners should concede credits for those items which they received which were above specifications, and not complain solely about the items which amounted to immaterial departures therefrom, and as to which the trial court found they agreed prior to such changes being made. The issue here raised would require a review of all evidence and a discussion of all specific facts pertaining thereto. It has been ruled by this Honorable Court that *certiorari* will not be granted merely to review the evidence or inferences drawn therefrom. *U. S. General Talking Pictures Corp.* v. *Western Elect. Co.*, 58 S. Ct. 849, 304 U. S. 175, 546, 82 L. Ed. 1273.

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**Erroneous Admission of Evidence**

At page 15 of their Petition, petitioners urge that the trial court erred in admitting in evidence a certain conversation between the petitioner, Kizziar, and the respond-

ent, Dollar, concerning plans of construction of the building in question. This objection apparently comes as an afterthought on the part of the petitioners in that as reflected by the record (R. 2-5), no assignment of error was made thereon by petitioners in their appeal before the Circuit Court of Appeals. The oft-repeated rule of all appellate courts has been and is that assignments of error not properly alleged on appeal are thereby waived. Further, the petitioners do not point out any prejudice to their cause by the admission of such testimony. It is accordingly respectfully urged that the complaint as here made by petitioners does not justify granting the writ of *certiorari* as herein sought.

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**Reopening of Judgment**

Petitioners further complain that error was committed in the refusal of the trial court to reopen the case, after judgment, for the purpose of receiving additional testimony upon the part of the petitioners. In support of petitioners' motion to reopen the case for further testimony there were attached various affidavits from witnesses, all of whom had testified in behalf of the petitioners at the trial of the cause. At most, the affidavit proof as offered in support of petitioners' motion to reopen the judgment was merely cumlative of evidence that had been offered by petitioners during the trial. In any event, the named witnesses whom petitioners now contend should have been

heard after the trial were all available to petitioners before and during the trial. It is respectfully submitted that litigation would be interminable if, after a fair and thorough hearing such as was here granted by the trial court, extending as it did over a period of two full days, in addition to consideration of approximately 150 pages of proof offered by deposition, the trial court would be required to open the cause and hear additional cumulative testimony on controverted factual issues theretofore determined. The law does not require such of any trial court. Rather the rule is that the ruling of the trial court on such a motion will not be disturbed on appeal except for abuse of discretion. Certainly in refusing to hear further cumulative testimony, after the patient and thorough hearing accorded the petitioners in the court below, the trial court did not abuse its discretionary power.

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**Assessment of Costs on Appeal**

By their petition, petitioners further complain that the Circuit Court erred in refusing to assess petitioners' costs of appeal against respondent.

Rule 26 of the Circuit Court of Appeals of the Tenth Circuit provides that in case of affirmance of any judgment costs would be allowed the appellee; whereas, in cases of reversal costs would be allowed the appellant unless otherwise ordered by the court.

It has long been recognized that both trial and appellate courts have wide discretion in the taxing of costs. The broad, basic rule is that costs are allowed the "prevailing" party. Rule 54 (d) of the Federal Rules of Civil Procedure expressly so provides. That the petitioners here do not consider themselves as having been the "prevailing" party in the Circuit Court is adequately established by the fact that it was the petitioners here who filed a petition for rehearing before the Circuit Court, and it is the same petitioners who here seek to appeal from the order and judgment of the Circuit Court. And it has been repeatedly held that "* * * the 'prevailing party' to whom costs are awarded is the one in whose favor judgment is entered, and he need not have received his entire claim." (See *Brown* v. *Consolidated Fisheries*, 8 F. R. D. 433, *Ex Parte Peterson*, 253 U. S. 300, 64 L. Ed. 919.

## CONCLUSION

As disclosed by the record of this cause (R. 35-36) the petitioner, Kizziar, conceded to others his indebtedness to Dollar but stated that it would require at least ten years for Dollar to collect the obligation. In view thereof, and in the light of the record of this cause as a whole there is much to support the view that petitioners' primary motive in the proceedings now before this Honorable Court is that of harassment of the respondent. It is apparent that the petitioners have used and are yet attempting to

use courses of delay to avoid their just obligation. With such spirit prevailing on the part of petitioners, in the light of usage, practice and justice, the respondent respectfully submits that this Honorable Court should deny to petitioners the issuance of the writ of *certiorari* as here sought, and dismiss this proceeding.

Respectfully submitted,

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